

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 97-727

January 15, 1998

MAINE PUBLIC SERVICE COMPANY
Application for Approval of an Electric
Rate Stabilization Agreement with
Wheelabrator-Sherman

ORDER GRANTING
CERTIFICATE OF
APPROVAL

WELCH, Chairman; NUGENT and HUNT, Commissioners

I. SUMMARY

In this Order, we issue a certificate of approval for an electric rate stabilization agreement (Agreement) submitted by Maine Public Service Company (MPS).¹ The Agreement restructures an existing power purchase agreement (PPA) between MPS and Wheelabrator-Sherman (W/S) consistent with statutory requirements.

II. BACKGROUND

On September 19, 1997, MPS filed, pursuant to 35-A M.R.S.A. § 3156, for approval of an electric rate stabilization agreement that amends its current W/S PPA. Under the existing PPA, MPS must purchase up to 126,582 MWh per year from W/S's 17.6 MW biomass plant in Sherman Station; the W/S plant is a qualifying facility (QF) pursuant to 35-A M.R.S.A. § 3303. The existing PPA specifies power purchase rates for an initial 15-year term (through the year 2000), and allows either party to extend the PPA for an additional 15 years at negotiated or Commission-set rates.

The proposed Agreement includes three elements. First, MPS would pay W/S \$8.6 million at closing; this amount would be financed by the Finance Authority of Maine (FAME) pursuant to 10-M.R.S.A. § 963(7-A). MPS would also pay W/S an additional \$2,350 per day (up to a maximum of \$105,750) for each day closing is delayed past November 1, 1997. Second, W/S would provide monthly credits to MPS for the remainder of the PPA initial term. These credits total \$10 million (nominal) and have a present value of approximately \$8 to \$9 million. The rates in the initial term of the PPA (1986-2000) do not change. Third, the Agreement would reduce the PPA extension period from 15 to 6 years, increase the purchase obligation in each of the extension term years by 10,000 MWh to 136,582 MWh, and establish purchase

¹Commissioner Hunt voted against this decision. See attached Dissenting Opinion.

prices for power beginning at \$.0854 per kWh in 2001 and escalating at 2% per year.

In addition to its request for approval of the Agreement, MPS filed a motion to modify its current rate plan² so that savings in the near term from the Agreement can be used to offset rate increases during the remaining term of the rate plan. Under MPS's current rate plan, savings from any restructuring of the W/S PPA would reduce specified deferrals that would be recovered in rates beginning in 2000. MPS has also filed two other motions, both designed to obtain Commission assurance that all costs of the Agreement will be recovered in rates.

During a prehearing conference held on October 10, 1997, the Hearing Examiner granted the petitions to intervene of the Public Advocate and Houlton Water Company. W/S did not petition to intervene, but participated throughout the proceeding by presenting its views of the benefits of the Agreement. The Commission held a hearing on this matter on November 4, 1997.

On November 14, 1997, the Commission issued an Order Denying Certificate of Approval, without prejudice, stating that it was unable to find, at that time, that the potential future costs of the Agreement were not likely to be disproportionate to near-term savings. The Commission encouraged MPS to re-file its petition for approval to allow more time to develop an informed judgment as to the long-term economics of the Agreement.³ MPS filed a letter resubmitting its petition on November 6, 1997.⁴

III. POSITIONS REGARDING THE AGREEMENT

A. Maine Public Service Company

In its initial filing, MPS requests approval of the Agreement as satisfying the requirements of section 3156. MPS states that the Agreement will produce near-term savings that will be reflected in rates and estimates the overall net present value (NPV) savings of the Agreement to be \$362,000. This estimated overall savings is based on MPS's view of the likely

²MPS is currently operating under a multi-year rate plan approved by the Commission on November 30, 1995 (Docket No. 95-052).

³Under section 3156, the Commission must issue or deny a certificate within 60 days of an application.

⁴MPS filed this letter in reaction to the Commission deliberations of this matter that occurred on November 4, 1997.

range of outcomes if the renewal term rates were litigated before the Commission.⁵

MPS argues that the Agreement provides certain near-term benefits (\$10 million reduction in PPA costs over 3 years) and that possible future rate impacts are not likely to be disproportionate; some amount of future uncertainty should be tolerated to obtain near-term savings. MPS notes that W/S has advanced some positions that appear credible and supportable, and that full litigation of the renewal term rates could result in an outcome that would be very expensive relative to the Agreement. Finally, MPS states that the outcome of renewal term rate litigation cannot be conclusively determined and that there are reasonable analyses showing a positive NPV; as such, the Commission should approve the Agreement to obtain the near-term savings and avoid a substantial litigation risk regarding future contract rates.

B. Public Advocate

The Public Advocate also supports approval of the Agreement, but does so cautiously. The Public Advocate states that the Agreement's savings, if any, cannot be calculated, that the Company's calculation relies on speculation as to the renewal term rates, and that the economics could range from substantial costs to substantial savings. The Public Advocate is concerned that the Agreement could provide near-term benefits at the cost of raising rates after 2000.

However, the Public Advocate supports the Agreement because of the significant reduction in risk it represents to MPS and its ratepayers by shortening the exposure to the W/S PPA; even if there are no net savings, there is a large benefit in the PPA terminating as soon as possible. In the Public Advocate's view, because no one can predict the outcome of litigation, the reduction of risk exposure of this magnitude subsumes other costs, benefits and analyses presented by the PPA restructuring proposal.

⁵As we discuss below, the economics of the Agreement are extremely sensitive to assumptions of what the renewal term rates would be in the absence of the Agreement. MPS provided its position on the *appropriate* outcome (as opposed to the *likely* outcome) of litigation on the renewal term rate; if MPS prevailed in its position, the Agreement would have a NPV cost of approximately \$10 million.

C. Wheelabrator-Sherman

W/S disagrees that the Agreement could result in any substantial losses to ratepayers in comparison to the unamended PPA. On the contrary, W/S argues that the Agreement, based on its view of the proper approach for establishing the renewal term rates, will save ratepayers millions of dollars. For these reasons, W/S urges the Commission to approve the Agreement.

IV. DISCUSSION OF AGREEMENT

Electric rate stabilization agreements are governed by section 3156. The section allows the Commission to issue a certificate of approval only if it makes five explicit findings. Before discussing the individual required findings, we present our general views regarding of the Agreement and why its approval is in the public interest.

In the near-term, the Agreement will undoubtedly provide savings in the range of \$3.5 million NPV through 2000. However, the overall economics of the Agreement depend on inherently speculative assumptions of what the renewal term rates would be in the absence of the Agreement. Renewal term rates would be determined based on the following language contained in the existing PPA:

the rates shall be based on avoided capacity costs of the same plant on which avoided capacity rates were based at the outset of this contract and on avoided energy costs. The parties agree to negotiate in good faith to set the avoided energy and capacity costs upon which rates shall be based. In the event the Buyer and Seller are unable to agree to the rate, the Buyer and Seller agree to submit the dispute to the Maine Public Utilities Commission.

The record contains three conceptual approaches to calculating the renewal term rates that lead to widely divergent results:

- ♦ Estimates of Seabrook I⁶ fixed costs and MPS system energy costs during 2001-2005;
- ♦ Estimates of Seabrook I fixed and variable costs during 2001-2005;

⁶Seabrook I is the plant on which the Commission initially based avoided capacity rates.

- ♦ Estimates of the market value of Seabrook I during 2001 through 2015.

Depending on the approach used, the net present value of the Agreement could range from approximately \$35 million in savings if Seabrook fixed costs and system energy are used, to approximately a \$21 million NPV cost if market value were to be employed. Estimates using Seabrook fixed and variable costs range from approximately a \$10 million cost to a \$5 million savings.

Assessing the value of the Agreement is further complicated by the non-specific nature of the renewal term language and the purpose for which the provision was initially included in the PPA. The provision was included at the urging of MPS so it would not lose the benefit of what it believed to be relatively low cost Seabrook power in the out-years compared to what it believed to be relatively higher cost alternatives. However, the situation turned out to be the opposite whereby Seabrook power is relatively more costly than currently existing alternatives. These circumstances present the Commission with an extremely difficult task of attempting to project the renewal term rates it would establish if the matter was disputed and brought to it for resolution, as well as considering the outcome of a court challenge.

We must consider the analytical task presented by this case in light of the statutory language contained in section 3156. Section 3156 appears to contain a bias in favor of near-term savings even at the expense of some increased level of long-term cost. Under the statute, we must find an agreement "will provide near-term benefits." We must then find that "[p]otential future adverse rate impacts . . . are not likely to be disproportionate to near-term gains." We read this language to mean that, if there are reasonably certain near-term savings, a rate stabilization agreement can be approved even if it results in overall increased costs, as long as those increased costs are not "disproportionate" to the near-term gains.

In this case, there are clear near-term benefits. Although there are reasonable scenarios upon which future adverse rate impacts would overwhelm those near-term benefits, there are also plausible (albeit not likely)⁷ futures by which a rejection of the Agreement would not only result in the loss of the

⁷Although W/S argues strenuously that use of Seabrook I fixed costs and system energy was the intent of the renewal term provision, such an approach is a conceptually incorrect method of calculating avoided costs that would result in a windfall to W/S at the expense of MPS ratepayers.

near-term gains, but cause ratepayers substantial adverse rate impacts throughout the next 15 years. Many of the likely scenarios, however, fall within an overall NPV range of approximately a \$5 million cost to a \$5 million benefit. On balance, we believe it is important to eliminate the risk of a substantial adverse outcome to ratepayers from litigation of the renewal term rates; it is also preferable to risk making a 6-year mistake rather than a 15-year mistake. By approving the Agreement, we ensure the near-term benefits for ratepayers as well as providing certainty that a power contract that has created a severe financial burden on MPS and its ratepayers over many years will conclude in 2006. It is on the basis of these considerations, that we view the Agreement to be in the public interest.

We now address specifically the five statutory findings required by section 3156.

1. The Agreement and any assistance in FAME financing will provide near-term benefits to ratepayers that will be reflected in rates.

As mentioned above, the Agreement will result in near-term benefits in the range of \$3.5 million NPV through 2000. As discussed below, we will modify the terms of MPS's current rate plan to allow a near-term flowthrough of the Agreement's benefits over the remaining years of the plan. Because we will proceed in this matter, the near-term benefits will be reflected in rates.

2. Potential future adverse rate impacts are not likely to be disproportionate to near-term gains.

This required finding relates to the overall net benefits or costs that the Agreement is likely to produce over its term. As discussed above, this issue depends on the inherently speculative question of what the renewal term rates would be in the absence of the Agreement. Based on the record in this case, and taking into account the great amount of uncertainty of any long-term analysis of this Agreement, we find that the potential for future adverse rate impacts is not likely to be disproportionate to the near-term gains.

3. The Agreement does not have as a necessary or probably consequence the permanent cessation of a QF of more than 50 MW.

Because the W/S facility is less than 50 MW, we make this third finding.

4. The Agreement is consistent with the Maine Energy Policy Act.

The Maine Energy Policy Act, 35-A M.R.S.A. § 3191, requires utilities to pursue a least cost energy plan, taking into account many factors including costs, risk and diversity of supply. For many of the reasons discussed above, we find that the Agreement is consistent with section 3191. Although we cannot say with certainty whether the long-term impacts of the Agreement will be positive or negative, the Agreement does reduce near-term costs as well as long-term risks without, as discussed below, adversely affecting the diversity supply. In this way, the Agreement is consistent with sound least cost planning.

5. The Agreement will not adversely impact the availability of a diverse and reliable mix of energy resources and will not significantly reduce the availability of long-term resources to meet electric demand.

The approval of the Agreement ensures that the W/S facility will be part of the energy mix until the year 2006. In the absence of the Agreement, it is possible that the facility would cease to operate after 2000 or continue to operate pursuant to the MPS PPA until 2015. It is also possible that the facility would continue to operate in the competitive generation market after 2006 when the Agreement expires. Even if the plant ceases to operate after 2006, Maine continues to have a relatively diverse energy mix. For these reasons, we find that the Agreement will not have an adverse impact on the diversity and reliability of the energy mix or significantly reduce the available of long-term resources.

V. MPS MOTIONS

As mentioned above, MPS filed a series of motions, seeking specified Commission findings. The motions are: (1) Motion to Alter or Amend the Commission's November 30, 1995 Order in Docket No. 95-052 (Order that approved MPS's rate plan); (2) Motion to Amend the Commission's February 10, 1984 and June 4, 1984 Orders in Docket Nos. 81-276, 83-264, and 83-303; and (3) Motion for Investigation into Recovery of Stranded Costs created by the

Agreement (this third motion seeks to serve the same purpose as the second motion).

In the first motion, MPS asks the Commission to modify the provisions of its rate plan to allow the Agreement's near-term savings to offset the increases it would otherwise seek in upcoming annual reviews. Under the terms of MPS's rate plan, any reductions to the cost of the W/S PPA must be used to reduce specified deferrals that would otherwise be included in rates beginning in 2000. MPS states that the requested modification will reduce necessary immediate rate increases and allow for near-term benefits to flow to ratepayers, which is a prerequisite of section 3156. The purpose of the second and third motions is to obtain the Commission determination that the Agreement is consistent with the original orders approving the W/S PPA and to ensure that any stranded costs created by the Agreement (as opposed to the original PPA) will be recovered in rates.

During the hearing on this matter, MPS clarified that it would be satisfactory for the Commission to make a general finding that it would modify the rate plan to allow for the near-term flowthrough of benefits during the term of the rate plan, without any specific indication of the manner by which this would be accomplished. MPS also indicated that it would be sufficient for the Commission to interpret the provisions of section 3156 and section 3208 (the stranded cost section of the restructuring legislation) to mean that the Company will recover in rates the Agreement's financing costs and costs of the PPA extension.

We find that it is reasonable to amend the MPS rate plan to allow a near-term flowthrough of the benefits of the Agreement during the Company's rate plan. No party has opposed this change in concept and it is certainly consistent with the Legislature's intent that the ratepayers realize the near-term benefits from FAME financed QF contract renegotiations in their rates. The specific timing of the flowthrough of the benefits will be considered as part of MPS's pending rate plan annual review, Docket No. 97-830.

We also find that under the provisions of sections 3156 and 3208, MPS should recover from its ratepayers the financing costs and costs of the PPA extension associated with the Agreement. Section 3156 states that the Commission may not disallow or prevent the recovery of electric utility costs, including costs to be paid to the QF, under the terms of a rate stabilization agreement based solely on the execution of the certified agreement. Section 3208 provides that utilities may recover legitimate, verifiable and unmitigatable stranded costs. These provisions evidence a legislative intent that MPS recover the

costs associated with the Agreement. These include the costs involved with the \$8.6 million payment to W/S and the payments for the extension term power purchases (2001-2006).⁸

Accordingly, we

O R D E R

A certificate of approval for the electric rate stabilization agreement filed by Maine Public Service Company on September 18, 1997, is hereby issued.

Dated at Augusta, Maine this 15th day of January, 1998.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
 Nugent

COMMISSIONER VOTING AGAINST: Hunt: See attached Dissenting
 Opinion

⁸Consistent with the treatment of stranded costs, MPS would recover only the cost of the power purchases net of the power's market value.

Dissenting Opinion of Commissioner Hunt

I would not approve Maine Public Service's proposed amendment to its Purchased Power Agreement with Wheelabrator Sherman. I do not believe the record supports one prong of Section 3156, which requires us to find that the potential for future adverse rate impacts are not likely to be disproportionate to the near-term gains.

Staff's analysis suggests that the 1997 amendment could result in a substantial loss to ratepayers in comparison to the unamended PPA over the longer term. Pursuant to that analysis, the Agreement is more likely than not to result in a significant NPV cost in an amount disproportionate to the near term savings. I do not express an opinion about what the conclusion would be if the matter were litigated before the Commission. As the OPA observed, one cannot "calculate with any degree of accuracy how much, if anything, the Company and its ratepayers will save by virtue of this agreement." I believe, however, that the Commission has reasonable and sound options regarding the methods to establishing renewal term rates that would withstand judicial scrutiny and that, if adopted, would result in lower long term costs for MPS ratepayers.

I agree with the majority that removing the risks inherent in litigation has some value. However, as the contract provision which governs the renewal term rates provides that a dispute over rates would be submitted to the Commission, and as the renewal provision is vague, a reviewing court would likely give the Commission discretion, provided our decision had record support and was theoretically sound. Over the long term, it is likely that ratepayers may be better positioned if the Commission rejected the Amendment as proposed.

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of adjudicatory proceedings are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 6(N) of the Commission's Rules of Practice and Procedure (65-407 C.M.R.11) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which consideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320 (1)-(4) and the Maine Rules of Civil Procedure, Rule 73 et seq.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320 (5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.